

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Communications Assistance for )  
Law Enforcement Act )

CC Docket No. 97-213  
DA 98-762

COMMENTS

of the

ORGANIZATION FOR THE PROMOTION AND  
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES

I. INTRODUCTION

1. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submits these comments in response to the Commission's April 20, 1998 Public Notice in CC Docket No. 97-213 (DA 98-762) which seeks comment on the issues raised by petitioners concerning the inability of carriers to comply with the Communications Assistance for Law Enforcement Act<sup>1</sup> by the enacted deadline and the subsequent need for the Commission to extend the compliance date. OPASTCO is a national trade association representing nearly 500 independently owned and operated telephone companies serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve over two million customers.

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<sup>1</sup> Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.) (CALEA, the Act).

2. OPASTCO's members are telecommunications carriers as defined by CALEA<sup>2</sup> and are therefore subject to the Act's capability and capacity requirements as well as to enforcement orders and civil penalties for non-compliance. Accordingly, OPASTCO has a paramount interest in the outcome of this proceeding. OPASTCO maintains that compliance with CALEA will remain unachievable for all carriers until at least October 25, 2000. The Commission should therefore promptly adopt a blanket two year extension of the compliance date. Concurrent with that decision, the Commission should also establish that carriers are not financially responsible for retrofitting any equipment deployed prior to the availability of CALEA-compliant technology under the "reasonably achievable" standard.

**II. THE COMMISSION SHOULD ADOPT A BLANKET TWO YEAR EXTENSION OF THE COMPLIANCE DATE FOR CALEA'S ASSISTANCE CAPABILITY REQUIREMENTS, LASTING UNTIL OCTOBER 25, 2000, THAT APPLIES TO ALL CARRIERS SUBJECT TO CALEA**

**A. The delay in the adoption of a permanent industry technical standard, the lack of available technical solutions, and the belated release of a final notice of capacity, clearly warrant a blanket two year extension of the compliance date**

3. As the Commission is well aware, the implementation of CALEA has fallen off course. Due to ongoing disagreements between the industry, law enforcement, and privacy interests regarding a proper and lawful technical standard, it was not until December 1997 that an interim industry technical standard was adopted by the Telecommunications Industry Association (TIA). Since that time, several parties have petitioned the Commission to intervene in the standard development process. In such an environment of uncertainty, manufacturers have understandably been reluctant to fully commit to the process of designing and deploying the

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<sup>2</sup> CALEA at Sec. 102(8)(A).

necessary software and equipment until the Commission's proceeding is complete and a final standard is adopted.<sup>3</sup>

4. Once a final standard is adopted, industry estimates range anywhere from 24 - 36 months for manufacturers to develop CALEA-compliant software and equipment for carriers' networks. That means if a final standard were adopted in June 1998, solutions would not be available to carriers until June 2000, at the earliest. From there, carriers would still require adequate time to install and test the new software and equipment in their existing networks.

5. In addition, despite CALEA's requirement that the Attorney General adopt capacity requirements within one year after the Act's passage,<sup>4</sup> the Federal Bureau of Investigation (FBI) just released its Final Notice of Capacity on March 12, 1998. Under the Act, carriers have three years from the time the Notice of Capacity is published to adopt the capacity requirements.<sup>5</sup> CALEA was drafted with the expectation that the capability requirements of Sec. 103 and the capacity requirements of Sec. 104 would be implemented simultaneously. Since carriers are not required to accommodate the required capacity until March 2001, there is little point in trying to satisfy the capability requirements on a considerably shorter implementation schedule.

6. Under to CALEA, the FCC may grant an extension of time for compliance with the assistance capability requirements if it determines that compliance is not reasonably achievable

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<sup>3</sup> While the major switch manufacturers have been involved in the development of the interim standard, OPASTCO's small and rural members deploy a wide variety of switches with a wide range of capabilities. These carriers lack the financial resources to upgrade their switches, much less replace them, if such upgrades are technically infeasible.

<sup>4</sup> CALEA at Sec. 104(a)(1).

<sup>5</sup> *Ibid.* at Sec. 104(b)(1).

through application of technology available within the compliance period.<sup>6</sup> By that criterion, all carriers will be eligible for the maximum initial two year extension of time permitted under CALEA<sup>7</sup> given the complete lack of available compliant technology and estimates for when such technology will be made available. Therefore, OPASTCO urges the Commission to adopt an order that applies to all carriers subject to CALEA that extends the compliance date until October 25, 2000, two years from the original October 25, 1998 deadline.<sup>8</sup> The Commission should issue its order on an expedited basis so that carriers can rest assured that they will not face any reprisal for non-compliance.<sup>9</sup>

**B. An extension is overwhelmingly supported by the record**

7. All of the petitions referenced in the FCC's Public Notice that discuss the feasibility of carriers to meet the compliance date concur that an extension is necessary.<sup>10</sup> The petition filed by the Center for Democracy and Technology (CDT) states that compliance with the industry

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<sup>6</sup> *Id.* at Sec. 107(c)(2) (emphasis added).

<sup>7</sup> *Id.* at Sec. 107(c)(3).

<sup>8</sup> In its December 12, 1997 comments on the NPRM in this proceeding, OPASTCO had suggested that the Commission adopt a simple streamlined petition for carriers to file for a two year extension that would apply to all of a carrier's equipment, facilities, and services. Since that time, it has become even more apparent that no carrier will be able to comply with the capability requirements prior to October 2000. Accordingly, OPASTCO now supports the Commission's adoption of a two year extension order that applies to all carriers.

<sup>9</sup> Under CALEA, a court may impose civil penalties of up to \$10,000 per day for non-compliance, beginning on October 25, 1998. 18 U.S.C. 2522. Of course, a flat-rated penalty has the greatest impact on the smallest carriers and one of this magnitude would quickly lead to financial ruin for OPASTCO members. It is therefore imperative that the Commission act promptly in this proceeding.

<sup>10</sup> In addition, virtually every commenting party to the FCC's October 10, 1997 NPRM supported an extension of the compliance date. *See, for example*, OPASTCO, 6-8; USTA, 13-14; TIA, 10-11; Motorola, 11; PCIA, 3; CTIA, 7; Nextel, 1; Bell Atlantic Mobile, 8; Primeco Personal Communications, 5; ACLU, et. al., 1; Rural Telephone Group, 7; PageNet, 14.

standard is not reasonably achievable and requests that the FCC delay implementation of CALEA indefinitely while a new standard is being developed. The TIA petition filed on April 2, 1998 requests, in part, that the Commission immediately announce suspension of enforcement of CALEA until the FCC issues its final determination on an industry standard and that the Commission establish a compliance schedule of at least 24 months to implement the decision. The petition filed on March 30, 1998 by AT&T Wireless Services Inc. (AWS), Lucent Technologies Inc., and Ericsson Inc. states that an extension of the compliance date is needed because CALEA-compliant hardware and software will not be available within the compliance period.<sup>11</sup> Even the FBI and the Department of Justice appear to recognize the inability of carriers to comply by October 1998, suggesting that that Commission make its final decision on a technical standard effective 18 months after the date of release. Finally, the April 9, 1998 joint response to the above-noted petitions filed by the Cellular Telecommunications Industry Association (CTIA), the Personal Communications Industry Association (PCIA), and the United States Telephone Association (USTA) recommends, in part, that the Commission suspend the CALEA compliance date during its rulemaking and grant an industry-wide extension to allow adequate time to implement any revised standard.

8. Given this unanimity among commenters with otherwise disparate viewpoints that an extension is necessary, the Commission should not hesitate to expeditiously adopt a blanket two year extension, beginning October 25, 1998, and extending until October 25, 2000.

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<sup>11</sup> AWS, Lucent and Ericsson also confirm that the further development of an industry solution prior to the adoption of a permanent standard would potentially expose them to a great waste of financial and engineering resources.

**C. A blanket order that applies to all carriers is the quickest, most efficient, and least burdensome method for extending the compliance date**

9. In its Public Notice, the Commission asks how it can most quickly and efficiently extend the compliance deadline if the factors supporting an extension apply equally to a large number of telecommunications carriers. As discussed above, a two year extension should apply equally to all carriers as there is no compliant technology commercially available and it will take at least two years for manufacturers to design and deploy equipment and software. Therefore, it is apparent that the easiest way to extend the compliance date for all carriers subject to CALEA would be, as the Commission itself suggests, to adopt an extension order that applies to all carriers subject to the deadline. This action would minimize the administrative burden on both carriers and the Commission.

10. Under Sec. 107(c)(1) of CALEA, petitions for extensions are to be made by carriers for specific equipment, facilities, or services that will be unable to comply with the capability requirements. Absent a blanket order from the Commission, carriers would be forced to prepare a request for extension for each individual component of their networks that is unable to comply; a burdensome task for any carrier but particularly small carriers who have limited staffs and resources. Then, the FCC would face the unenviable task of responding to all of these petitions, which could easily reach into the thousands. To avoid bogging down both carriers and the FCC in unnecessary paperwork, the Commission can simply adopt a blanket two year extension of the compliance date, applicable to all carriers subject to CALEA.

11. In addition, adopting a blanket two year extension now will make it easier for the Commission to ensure that the objectives and obligations of CALEA are met in the most timely

manner. While it is clear that no carrier will reasonably be able to comply with the capability requirements prior to October 25, 2000, it is presently uncertain how soon after that date carriers will be able to meet their CALEA obligations. By adopting an order extending the compliance date for two years, the Commission can focus its attention on whether or not an additional extension is necessary after October 25, 2000, and if so, for what length of time.<sup>12</sup> As the expiration of the initial two year extension draws closer, the Commission can solicit public comment on the availability of compliant technology and whether or not carriers' compliance is reasonably achievable by the new deadline. The Commission can then make a determination on whether an additional blanket extension order is necessary or if requiring those carriers who require additional time to file individual petitions is more appropriate.

**III. THE COMMISSION SHOULD ESTABLISH THAT THE COMPLIANCE OF EQUIPMENT, FACILITIES, AND SERVICES DEPLOYED SINCE JANUARY 1, 1995, BUT PRIOR TO MANUFACTURERS' COMMERCIAL RELEASE OF CALEA SOLUTIONS, IS NOT REASONABLY ACHIEVABLE**

12. Congress did not intend for carriers to pay for the retrofitting of existing facilities to comply with CALEA. Under the Act, a minimum four year transition period was provided to allow for the development of safe harbor standards from which would soon follow the commercial availability of CALEA-compliant equipment. The transition was intended to protect not only equipment already "installed" by 1995, but also equipment deployed (i.e. designed or

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<sup>12</sup> While CALEA establishes a two year maximum length for extensions granted by the Commission, the Act also permits the Commission to grant carriers as many extensions it determines are warranted based on the grounds that compliance with Sec. 103 is not reasonably achievable through application of technology available within the compliance period. CALEA at Sec. 107(c).

developed) prior to January 1, 1995 and subsequently installed.<sup>13</sup> In fact, one of the criteria the FCC must consider in its “reasonably achievable” determinations is “the extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995.”<sup>14</sup> In contrast, the FBI has wrongly ignored any distinction between the two terms, defining the phrase “installed or deployed” as “...equipment facilities, or services [that] are operable and available for use by the carrier’s customers.”<sup>15</sup>

13. It was Congress’ expectation that soon after January 1, 1995, manufacturers would have CALEA-compliant equipment ready to make commercially available. Unfortunately, as previously discussed, CALEA’s implementation has not gone according to schedule, and equipment, facilities, and services today are no more CALEA-compliant than they were in 1994. Meanwhile, small local exchange carriers (LECs) continue to install new equipment and software in their networks -- both voluntarily and as a result of government mandates -- with the fear that they will be responsible for the cost of retrofitting these upgrades when CALEA-compliant technology eventually comes to market. For small and rural LECs especially, with their limited resources, small subscriber base, and lack of scale economies, the cost of retrofitting all of their existing network would be overwhelming and could ultimately need to be recovered, in part, through higher rates. Nowhere in CALEA is there a requirement that carriers must pay the cost of retrofitting existing equipment and certainly Congress did not intend for small carriers and

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<sup>13</sup> CALEA at Sec. 109(a). *See also*, H. Rept. 103-827, p. 16.

<sup>14</sup> *Id.* Sec. 109(b)(1)(J) (emphasis added).

<sup>15</sup> 62 FR 13325.



their customers to bear the financial burden of retrofitting equipment purchased at a time during which no CALEA-compliant technology was even available.

14. Accordingly, OPASTCO urges the Commission to remove any doubt that existing network equipment, facilities, and services are deemed in compliance with CALEA until CALEA-based technical solutions are available for installation in carriers' networks. One way the Commission can accomplish this is by adding an additional factor for it to consider in its "reasonably achievable" determinations. Sec. 109(b)(1)(K) of CALEA allows for "[s]uch other factors as the Commission determines are appropriate" in its determinations of "reasonably achievable." Thus, the Commission can and should adopt an additional factor which considers the extent to which equipment, facilities, and services were deployed prior to the commercial availability of CALEA-compliant solutions. The Commission should take this action concurrent with its determination to extend the compliance date.


#### **IV. CONCLUSION**


15. For the reasons stated above, the Commission should promptly issue a blanket order, applicable to all carriers subject to CALEA, extending until October 25, 2000 the date for compliance with the Sec. 103 assistance capability requirements. In addition, the Commission should concurrently establish that any equipment deployed after January 1, 1995, but prior to the commercial availability of CALEA-compliant technical solutions, will be deemed "not reasonably achievable" for purposes of compliance with CALEA. By adopting these recommendations, the FCC will help to minimize the burden of CALEA compliance on small

and rural LECs and their customers as well as minimize resource burdens on the Commission in performing its implementation responsibilities.

Respectfully submitted,

**THE ORGANIZATION FOR THE  
PROMOTION AND ADVANCEMENT OF  
SMALL TELECOMMUNICATIONS COMPANIES**

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